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DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS-R5-ES-2012-0045]

[4500030113]

RIN 1018-AY12

**Endangered and Threatened Wildlife and Plants; Endangered Status for the
Diamond Darter and Designation of Critical Habitat**

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule; reopening of comment period and availability of draft economic analysis.

SUMMARY: We, the U.S. Fish and Wildlife Service, announce the reopening of the public comment period on our July 26, 2012, proposed listing and designation of critical habitat for the diamond darter (*Crystallaria cincotta*) under the Endangered Species Act of 1973, as amended (Act). We also announce the availability of a draft economic analysis (DEA) of the proposed designation of critical habitat and an amended required determinations section of the proposal. We are reopening the comment period to allow all interested parties an opportunity to comment simultaneously on the proposed rule, associated DEA, and amended required determinations section. Comments previously submitted on the proposed rule need not be resubmitted, as they will be fully considered in preparation of the final rule.

DATES: We will consider all comments received or postmarked on or before [INSERT DATE 30 DAYS AFTER DATE OF FEDERAL REGISTER PUBLICATION].

Comments submitted electronically using the Federal eRulemaking Portal (see **ADDRESSES**, below) must be received by 11:59 p.m. Eastern Time on the closing date.

ADDRESSES: *Document availability:* You may obtain copies of the proposed rule and the draft economic analysis on the Internet at <http://www.regulations.gov> at Docket Number FWS-R5-ES-2012-0045, or by mail from the West Virginia Field Office (see **FOR FURTHER INFORMATION CONTACT**).

Comment submission: You may submit written comments by one of the

following methods:

(1) *Electronically*: Go to the Federal eRulemaking Portal:

<http://www.regulations.gov>. Search for Docket No. FWS–R5–ES–2012–0045, which is the docket number for this rulemaking.

(2) *By hard copy*: Submit by U.S. mail or hand-delivery to: Public Comments

Processing, Attn: FWS–R5–ES–2012–0045; Division of Policy and Directives

Management; U.S. Fish and Wildlife Service; 4401 N. Fairfax Drive, MS 2042–PDM;

Arlington, VA 22203.

We request that you send comments only by the methods described above. We will post all comments on <http://www.regulations.gov>. This generally means that we will post any personal information you provide us (see the **Public Comments** section below for more information).

FOR FURTHER INFORMATION CONTACT:

John Schmidt, Acting Field Office Supervisor, U.S. Fish and Wildlife Service, West Virginia Field Office, 694 Beverly Pike, Elkins, WV 26241; by telephone (304) 636-6586; or by facsimile (304) 636-7824. Any person who uses a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 800-877-8339.

SUPPLEMENTARY INFORMATION:

Public Comments

We will accept written comments and information during this reopened comment period on our proposed listing and designation of critical habitat for the diamond darter (*Crystallaria cincotta*) that was published in the **Federal Register** on July 26, 2012 (77 FR 43906), our DEA, and the amended required determinations provided in this document. We will consider information and recommendations from all interested parties.

We are also notifying the public that we will publish two separate rules for the final listing determination and the final critical habitat determination for the diamond darter. The final listing rule will publish under the existing docket number, FWS–R5–ES–2012–0045, and the final critical habitat designation will publish under new docket number FWS–R5–ES–2013–0019.

We will consider information and recommendations from all interested parties as to both determinations. As to the proposed listing determination, we are particularly interested in comments concerning:

(1) Biological, commercial trade, or other relevant data concerning any threats (or lack thereof) to this species and regulations that may be addressing those threats.

(2) Additional information concerning the historical and current status, range, distribution, and population size of this species, including the locations of any additional populations of this species.

(3) Any information on the biological or ecological requirements of the species, and ongoing conservation measures for the species and its habitat.

(4) Current or planned activities in the areas occupied by the species and possible impacts of these activities on this species.

As to the proposed critical habitat determination, we are particularly interested in comments concerning:

(5) The reasons why we should or should not designate habitat as “critical habitat” under section 4 of the Act, including whether there are threats to the species from human activity, the degree of which can be expected to increase due to the designation, and whether that increase in threat outweighs the benefit of designation such that the designation of critical habitat is not prudent.

(6) Specific information on:

(a) The amount and distribution of the species’ habitat;

(b) What areas occupied by the species at the time of listing that contain features

essential for the conservation of the species we should include in the designation and why;

(c) Special management considerations or protection that may be needed in critical habitat areas we are proposing, including managing for the potential effects of climate change; and

(d) What areas not occupied at the time of listing are essential to the conservation of the species and why.

(7) Land use designations and current or planned activities in the subject areas and their possible impacts on proposed critical habitat.

(8) Any foreseeable economic, national security, or other relevant impacts that may result from designating any area that may be included in the final designation. We are particularly interested in any impacts on small entities and the benefits of including or excluding areas from the proposed designation that are subject to these impacts.

(9) Information on the extent to which the description of economic impacts in the DEA is complete and accurate.

(10) The likelihood of adverse social reactions to the designation of critical habitat, as discussed in the DEA, and how the consequences of such reactions, if likely to occur, would relate to the conservation and regulatory benefits of the proposed critical

habitat designation.

(11) Whether our approach to designating critical habitat could be improved or modified in any way to provide for greater public participation and understanding, or to assist us in accommodating public concerns and comments.

If you submitted comments or information on the proposed rule (77 FR 43906) during the initial comment period from July 26, 2012, to September 24, 2012, please do not resubmit them. We have incorporated them into the public record as part of the original comment period, and we will fully consider them in the preparation of our final determination.

You may submit your comments and materials concerning the proposed rule or DEA by one of the methods listed in **ADDRESSES**. We request that you send comments only by the methods described in **ADDRESSES**.

If you submit a comment via <http://www.regulations.gov>, your entire comment—including any personal identifying information—will be posted on the website. We will post all hardcopy comments on <http://www.regulations.gov> as well. If you submit a hardcopy comment that includes personal identifying information, you may request at the top of your document that we withhold this information from public review. However, we cannot guarantee that we will be able to do so.

Comments and materials we receive, as well as supporting documentation we used in preparing the proposed rule and DEA, will be available for public inspection on <http://www.regulations.gov> at Docket No. FWS–R5–ES–2012–0045 for the proposed listing action and at Docket No. FWS–R5–ES–2013–0019 for the proposed critical habitat designation, or by appointment, during normal business hours, at the U.S. Fish and Wildlife Service, West Virginia Field Office (see **FOR FURTHER INFORMATION CONTACT**).

Background

It is our intent to discuss in this document only those topics directly relevant to the designation of critical habitat for the diamond darter. For more information on the diamond darter, its habitat, or previous Federal actions, refer to the proposed listing and designation of critical habitat published in the **Federal Register** on July 26, 2012 (77 FR 43906), which is available online at <http://www.regulations.gov> (at Docket Number FWS–R5–ES–2012–0045) or from the West Virginia Field Office (see **FOR FURTHER INFORMATION CONTACT**).

Previous Federal Actions

On July 26, 2012, we published a proposed rule to list the diamond darter as endangered and to designate critical habitat (77 FR 43906). We proposed to designate a total of approximately 123 river miles of critical habitat in Kanawha and Clay Counties,

West Virginia, and Edmonson, Hart, and Green Counties, Kentucky. That proposal had a 60-day comment period, ending September 24, 2012.

Critical Habitat

Section 3 of the Act defines critical habitat as the specific areas within the geographical area occupied by a species, at the time it is listed in accordance with the Act, on which are found those physical or biological features essential to the conservation of the species and that may require special management considerations or protection, and specific areas outside the geographical area occupied by a species at the time it is listed, upon a determination that such areas are essential for the conservation of the species. If the proposed rule is made final, section 7 of the Act will prohibit destruction or adverse modification of critical habitat by any activity funded, authorized, or carried out by any Federal agency. Federal agencies proposing actions affecting critical habitat must consult with us on the effects of their proposed actions, under section 7(a)(2) of the Act.

Consideration of Impacts Under Section 4(b)(2) of the Act

Section 4(b)(2) of the Act requires that we designate critical habitat based upon the best scientific data available, after taking into consideration the economic impact, impact on national security, or any other relevant impact of specifying any particular area as critical habitat. We may exclude an area from critical habitat if we determine that the benefits of excluding the area outweigh the benefits of including the area as critical

habitat, provided such exclusion will not result in the extinction of the species.

When considering the benefits of inclusion for an area, we consider, among other things, the additional regulatory benefits that area would receive from the protection from adverse modification or destruction as a result of actions with a Federal nexus (activities conducted, funded, permitted, or authorized by Federal agencies), the educational benefits of mapping areas containing essential features that aid in the recovery of the listed species, and any benefits that may result from designation due to State or Federal laws that may apply to critical habitat. When considering the benefits of exclusion, we consider, among other things, whether exclusion of a specific area is likely to result in conservation; the continuation, strengthening, or encouragement of partnerships; or implementation of a management plan.

In the case of the diamond darter, the benefits of critical habitat include public awareness of the presence of the fish and the importance of habitat protection, and, where a Federal nexus exists, increased habitat protection for the diamond darter due to protection from adverse modification or destruction of critical habitat. In practice, situations with a Federal nexus exist primarily on Federal lands or for projects undertaken by Federal agencies.

We have not proposed to exclude any areas from critical habitat. However, the final decision on whether to exclude any areas will be based on the best scientific data

available at the time of the final designation, including information obtained during the comment period and information about the economic impact of designation.

Accordingly, our DEA concerning the proposed critical habitat designation is available for review and comment (see **ADDRESSES**).

Draft Economic Analysis

The purpose of the DEA is to identify and analyze the potential economic impacts associated with the proposed critical habitat designation for the diamond darter. The DEA separates conservation measures into two distinct categories according to “without critical habitat” and “with critical habitat” scenarios. The “without critical habitat” scenario represents the baseline for the analysis, considering protections otherwise afforded to the diamond darter (including listing under the Act, as well as other Federal, State, and local regulations). The “with critical habitat” scenario describes the incremental impacts specifically due to designation of critical habitat for the species. In other words, these incremental conservation measures and associated economic impacts would not occur but for the designation. Conservation measures implemented under the baseline (without critical habitat) scenario are described qualitatively within the DEA, but economic impacts associated with these measures are not quantified. Economic impacts are only quantified for conservation measures implemented specifically due to the designation of critical habitat (i.e., incremental impacts). For a further description of the methodology of the analysis, see Chapter 2, “Framework for the analysis,” of the DEA.

The DEA provides estimated costs of the foreseeable potential economic impacts of the proposed critical habitat designation for the diamond darter over the next 20 years, which was determined to be the appropriate period for analysis because limited planning information is available for most activities to forecast activity levels for projects beyond a 20-year timeframe. The DEA identifies potential incremental costs as a result of the proposed critical habitat designation; these are those costs attributed to critical habitat over and above those baseline costs attributed to listing. The DEA quantifies economic impacts of the diamond darter conservation efforts associated with the following categories of activity: (1) Resource extraction (coal, gravel, and rock mining, and oil and natural gas exploration) and utilities; (2) timber management, agriculture, and grazing; (3) other in-stream work; (4) transportation (roads, highways, bridges); and (5) water quality/sewage management.

The DEA concludes that the types of conservation efforts requested by the Service during section 7 consultation regarding the diamond darter are not expected to change due to critical habitat designation. The Service believes that results of consultation under the adverse modification and jeopardy standards are likely to be similar because: (1) The primary constituent elements that define critical habitat are also essential for the survival of the diamond darter; (2) the diamond darter is limited in its range; and (3) the number of individuals in the surviving population is very small. In addition, although one of the proposed critical habitat units for the diamond darter is unoccupied, incremental impacts of the critical habitat designation will be limited for the

following reasons: (1) The unit is currently occupied by nine federally listed endangered mussel species: northern riffleshell (*Epioblasma torulosa rangiana*), snuffbox (*E. triquetra*), pink mucket (*Lampsilis abrupta*), ring pink (*Obovaria retusa*), rough pigtoe (*Pleurobema plenum*), clubshell (*P. clava*), fanshell (*Cyprogenia stegaria*), spectaclecase (*Cumberlandia monodonta*), and sheepnose (*Plethobasus cyphus*); and (2) the unit is situated at least partially within the Mammoth Cave National Park, which is managed according to a land and resource management plan that includes specific measures to protect sensitive species.

The DEA concludes that incremental impacts of critical habitat designation are limited to additional administrative costs of consultations and that indirect incremental impacts are unlikely to result from the designation of critical habitat for the diamond darter. The present value of the total direct (administrative) incremental cost of critical habitat designation is \$800,000 over the next 20 years assuming a 7 percent discount rate, or \$70,000 on an annualized basis. Transportation activities are likely to be subject to the greatest incremental impacts at \$320,000 over the next 20 years, followed by timber management, agriculture, and grazing at \$260,000; resource extraction at \$150,000; other in-stream work at \$50,000; and water quality/sewage management at \$18,000 (present values over 20 years assuming a 7 percent discount rate).

As we stated earlier, we are soliciting data and comments from the public on the DEA, as well as all aspects of the proposed rule and our amended required

determinations.

Required Determinations—Amended

In our July 26, 2012, proposed rule (77 FR 43906), we indicated that we would defer our determination of compliance with several statutes and executive orders until the information concerning potential economic impacts of the designation and potential effects on landowners and stakeholders became available in the DEA. We have now made use of the DEA data to make these determinations. In this document, we affirm the information in our proposed rule concerning Executive Orders (E.O.) 12866 and 13563 (Regulatory Planning and Review), E.O. 12630 (Takings), E.O. 13132 (Federalism), E.O. 12988 (Civil Justice Reform), E.O. 13211 (Energy, Supply, Distribution, and Use), the Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*), the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the National Environmental Policy Act (42 U.S.C. 4321 *et seq.*), and the President’s memorandum of April 29, 1994, “Government-to-Government Relations with Native American Tribal Governments” (59 FR 22951). However, based on the DEA data, we are amending our required determinations concerning the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*).

Regulatory Flexibility Act (5 U.S.C. 601 et seq.)

Under the Regulatory Flexibility Act (RFA; 5 U.S.C. 601 *et seq.*), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA; 5 U.S.C.

801 *et seq.*), whenever an agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effects of the rule on small entities (i.e., small businesses, small organizations, and small government jurisdictions). However, no regulatory flexibility analysis is required if the head of the agency certifies the rule will not have a significant economic impact on a substantial number of small entities. The SBREFA amended the RFA to require Federal agencies to provide a certification statement of the factual basis for certifying that the rule will not have a significant economic impact on a substantial number of small entities. Based on our DEA of the proposed designation, we provide our analysis for determining whether the proposed rule would result in a significant economic impact on a substantial number of small entities. Based on comments we receive, we may revise this determination as part of our final rule.

According to the Small Business Administration, small entities include small organizations such as independent nonprofit organizations; small governmental jurisdictions, including school boards and city and town governments that serve fewer than 50,000 residents; and small businesses (13 CFR 121.201). Small businesses include manufacturing and mining concerns with fewer than 500 employees, wholesale trade entities with fewer than 100 employees, retail and service businesses with less than \$5 million in annual sales, general and heavy construction businesses with less than \$27.5 million in annual business, special trade contractors doing less than \$11.5 million in

annual business, and agricultural businesses with annual sales less than \$750,000. To determine if potential economic impacts to these small entities are significant, we considered the types of activities that might trigger regulatory impacts under this designation as well as types of project modifications that may result. In general, the term “significant economic impact” is meant to apply to a typical small business firm’s business operations.

To determine if the proposed designation of critical habitat for the diamond darter would affect a substantial number of small entities, we considered the number of small entities affected within particular types of economic activities, such as resource extraction; timber management, agriculture, and grazing; other in-stream activities; transportation; and water quality/sewer management. In order to determine whether it is appropriate for our agency to certify that this proposed rule would not have a significant economic impact on a substantial number of small entities, we considered each industry or category individually. In estimating the numbers of small entities potentially affected, we also considered whether their activities have any Federal involvement. Critical habitat designation will not affect activities that do not have any Federal involvement; designation of critical habitat only affects activities conducted, funded, permitted, or authorized by Federal agencies. If we finalize the proposed listing for this species, in areas where the diamond darter are present, Federal agencies will be required to consult with us under section 7 of the Act on activities they fund, permit, or implement that may affect the species. If we finalize the proposed critical habitat designation, consultations

to avoid the destruction or adverse modification of critical habitat would be incorporated into the existing consultation process.

In the DEA, we evaluated the potential economic effects on small entities resulting from implementation of conservation actions related to the proposed designation of critical habitat for the diamond darter. We do not expect the critical habitat designation to result in impacts to small entities for transportation and water quality/sewer management activities, as consultations considering these activities do not involve third parties. We anticipate 12 small entities over 20 years, or less than 1 entity in a single year, could be affected by other in-stream work at a cost of \$875 to \$8,800 each, representing less than 1 percent of annual revenues. In the resource extraction category, 50 small entities over 20 years, or 3 entities in a single year, could be affected by utility pipeline installation at a cost of \$875 to \$8,800 each, representing less than 1 percent of annual revenues, and 6 small entities could be affected by bituminous coal and lignite surface mining within a single year, at a cost of \$875 to \$5,300 each, representing less than 1 percent of annual revenues. One hundred and ninety small entities could be affected by timber management, agriculture, and grazing within a single year, at a cost of \$880 to \$22,000 each, representing less than 1 percent of annual revenues. Please refer to the DEA of the proposed critical habitat designation for a more detailed discussion of potential economic impacts.

The Service's current understanding of recent case law is that Federal agencies are

only required to evaluate the potential impacts of rulemaking on those entities directly regulated by the rulemaking; therefore, they are not required to evaluate the potential impacts to those entities not directly regulated. The designation of critical habitat for an endangered or threatened species only has a regulatory effect where a Federal action agency is involved in a particular action that may affect the designated critical habitat. Under these circumstances, only the Federal action agency is directly regulated by the designation, and, therefore, consistent with the Service's current interpretation of RFA and recent case law, the Service may limit its evaluation of the potential impacts to those identified for Federal action agencies. Under this interpretation, there is no requirement under the RFA to evaluate the potential impacts to entities not directly regulated, such as small businesses. However, Executive Orders 12866 and 13563 direct Federal agencies to assess costs and benefits of available regulatory alternatives in quantitative (to the extent feasible) and qualitative terms. Consequently, it is the current practice of the Service to assess to the extent practicable these potential impacts, if sufficient data are available, whether or not this analysis is believed by the Service to be strictly required by the RFA. In other words, while the effects analysis required under the RFA is limited to entities directly regulated by the rulemaking, the effects analysis under the Act, consistent with the EO regulatory analysis requirements, can take into consideration impacts to both directly and indirectly impacted entities, where practicable and reasonable.

In summary, we have considered whether the proposed designation would result

in a significant economic impact on a substantial number of small entities. For the above reasons and based on currently available information, we certify that, if promulgated, the proposed critical habitat designation would not have a significant economic impact on a substantial number of small business entities. Therefore, an initial regulatory flexibility analysis is not required.

Authors

The primary authors of this notice are the staff members of the West Virginia Field Office (see **FOR FURTHER INFORMATION CONTACT**).

Authority

The authority for this action is the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*).

Date: _____ March 14, 2013 _____

Signed: _____

Rachel Jacobson

Principal Deputy

Assistant Secretary for Fish and Wildlife and Parks

~~**[Endangered and Threatened Wildlife and Plants; Endangered Status for the
Diamond Darter and Designation of Critical Habitat]**~~

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